UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CORDIUS TRUST,	:	
Plaintiff,	:	Case No. 04-MBD-10267
- against -	:	
DONALD KUMMERFELD,	:	
Defendant.	:	APRIL 12, 2005

AFFIDAVIT OF BRADFORD S. BABBITT IN SUPPORT OF MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S RULE 62 MOTION FOR STAY PENDING APPEAL

I, Bradford S. Babbitt, being duly sworn, do hereby depose and say:

1. I am over the age of 18 and understand the obligations of an oath.

2. I am an attorney admitted to the practice of law in the State of Connecticut, the Commonwealth of Massachusetts, the United States District Courts sitting in those states and the United States Court of Appeals for the Second Circuit. I am a partner in the firm of Robinson & Cole LLP.

3. I represent Cordius Trust in the above captioned case and have since its inception. In connection with this case, I was admitted *pro hac vice* by The Honorable Denise Cote, Judge of the United States District Court in the Southern District of New York.

4. I submit this affidavit and the exhibits attached hereto in support of Cordius Trust's Memorandum Of Law In Opposition To Donald Kummerfeld's Rule 62 Motion For Stay Pending Appeal.

5. Exhibit 1 attached hereto is a true and accurate copy of the transcript of the ruling of the United States District Court for the Southern District of New York, Denise Cote, J., issued in open court at the conclusion of the bench trial in *Cordius Trust v. Elizabeth Kummerfeld and Kummerfeld Associates, Inc.*, 99 Civ. 3200 (DLC).

6. Exhibit 2 attached hereto is a true and accurate copy of the judgment entered by the United States District Court for the Southern District of New York, Denise Cote, J., in *Cordius Trust v. Elizabeth Kummerfeld and Kummerfeld Associates, Inc.*, 99 Civ. 3200 (DLC).

7. Exhibit 3 attached hereto is a true and accurate copy of the ruling of the United States Court of Appeals for the Second Circuit in *Cordius Trust v. Elizabeth Kummerfeld and Kummerfeld Associates, Inc.*, 99 Civ. 3200 (DLC).

8. Exhibit 4 attached hereto is a true and accurate copy of the ruling of the United States District Court for the Southern District of New York, Denise Cote, J., on the petition of Cordius Trust for a writ of execution and turnover order against Donald Kummerfeld *Cordius Trust v. Donald Kummerfeld*, 99 Civ. 3200 (DLC).

9. Exhibit 5 attached hereto is a true and accurate copy of the judgment entered by the United States District Court for the Southern District of New York, Denise Cote, J., on the petition of Cordius Trust for a writ of execution and turnover order against Donald Kummerfeld *Cordius Trust v. Donald Kummerfeld*, 99 Civ. 3200 (DLC).

10. Exhibit 6 attached hereto is a true and accurate copy of the Declaration of Defendant or Offender Net Worth and Cash Flow Statements executed by Elizabeth Kummerfeld on June 10, 2002, in the criminal matter docket number 00 CR 49 in the United States District Court for the Southern District of New York. I obtained this document from counsel for Donald D. Kummerfeld.

11. In connection with post-judgment discovery in this action, I went to the clerk's office of the United States District Court for the Southern District of New York and obtained a copy of a Declaration of Gerald E. Ross in Support of Application of Defendant Elizabeth Miller Kummerfeld to Modify Travel Restriction dated October 18, 2000. A true and accurate copy of that Declaration is attached hereto as Exhibit 7. The Declaration was executed by counsel for Mrs. Kummerfeld in the criminal proceedings against her before The Honorable Kimba Wood, which resulted in the conviction of Mrs. Kummerfeld for wire fraud, docket number 00 CR. 49. The Declaration is docket entry number 54 in that matter. As shown in paragraph 9 of that Declaration, Mrs. Kummerfeld's counsel in that case submitted to the court a certified appraisal dated October 5, 2000, establishing a fair market value of the Kummerfelds' Brewster property of $1.7 million. The appraisal is attached to Attorney Ross's Declaration.

12. On May 14, 2004, counsel for Donald Kummerfeld produced to the undersigned two appraisals of the Brewster property that were prepared on March 10 and 15, 2004. These appraisals are attached as Exhibits 8 and 9 to this Affidavit. The first appraisal by Thomas Podzikowski, appraises the fair market value of the property "as is" at $1.85 million. The second appraisal, by Mark D. Harvey, appraised the property at $1.5 million in its "as is" condition.

13. Exhibit 10 attached hereto is a true and accurate copy of a Restraining Notice to Judgment Debtors issued by counsel for Cordius Trust to Elizabeth Kummerfeld and Kummerfeld Associates, Inc. on February 20, 2001.

14. On May 27, 2004, staff from my office printed the docket sheet from the case of *Gazaba SA De CV v. Kummerfeld*, docket number 2:01 cv 2579, from the Western District of Tennessee. A true and accurate copy of that docket sheet, as of that date, is attached hereto as Exhibit 11.

Dated: April 12, 2005

CORDIUS TRUST

By: _____

Bradford S. Babbitt (BBO-566390)
Email: bbabbitt@rc.com
Robinson & Cole LLP
One Boston Place
Boston, MA 02108-4404
Tel. 617-557-5900
Fax 617-557-5999

State of Connecticut SS:

County of Hartford

The foregoing instrument was acknowledged before me this 12th day of April, 2005by Bradford S. Babbitt as true to the best of his knowledge and belief.

_____
Commissioner of the Superior Court
Notary Public
My Commission Expires:

CHRISTINE M. MARKSTEIN
NOTARY PUBLIC
MY COMMISSION EXPIRES MAY 31, 2009

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2005, I caused a copy of Cordius Trust's Opposition to Donald Kummerfeld's Motion for Stay Pending Appeal Without Bond and the Affidavit of Bradford S. Babbitt in Support of Memorandum of Law in Opposition to Defendant's Rule 62 Motion for Stay Pending Appeal to be served on the interested parties in this action by mailing a copy of same to the following:

Michael Martin
Foley Hoag
155 Seaport Boulevard
Boston, MA 02210

Mary L Cataudella

Mary L. Cataudella

EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CORDIUS TRUST,

Plaintiff,

v. 99 Civ. 3200 (DLC)

ELIZABETH KUMMERFELD, and
KUMMERFELD ASSOCIATES, INC.,

Defendants.

----------x

February 7, 2000
2:10 p.m.

Before:

HON. DENISE L. COTE,

District Judge

APPEARANCES

ROBINSON & COLE LLP
Attorneys for Plaintiff
BY: JAMES WADE
BRADFORD S. BABBITT

SHELDON FARBER
Attorney for Defendants

THE COURT: This diversity action arises out of defendants' alleged breach of a promissory note executed by Elizabeth Kummerfeld both in her individual capacity and as president of Kummerfeld Associates, Inc., or KAI. The Note, payable to plaintiff Cordius Trust, is for $1,418,000. Plaintiff alleges that defendants have defaulted on the Note and seeks to recover the amount of the Note, prejudgment interest in accordance with the terms of the Note, postjudgment interest, and attorneys' fees and costs.

In their answer, defendants contend that the Note is unenforcible because it is usurious and its execution was induced through fraudulent representations, threats, duress and coercion. They have filed counterclaims for fraud and *prima facie* tort.

In accordance with the individual practices of this Court in civil bench trials, the parties were instructed to submit the direct testimony of their witnesses by affidavit and deposition designations in advance of trial, by January 21. The pretrial documents received by the Court contained neither affidavits nor deposition designations. Neither party had requested additional time in which to prepare such documents.

In a conference held with the Court on January 28, plaintiff indicated that it had believed it had included an affidavit with its pretrial submissions, and offered the

affidavit of Joel Richards executed on January 20. Defendants, represented at that time by Thomas Caulfield, admitted that they had neither submitted any affidavits or deposition designations nor requested additional time in which to do so. The Court thereafter confirmed that Richards would be the sole trial witness, that the only direct testimony the Court would consider would be reflected in his affidavit, and that any offer of proof by the defendants as to affirmative defenses or counterclaims would be confined to the cross-examination of Richards.

On January 31, Sheldon Farber entered a notice of appearance as defendants' counsel. On February 4, Mr. Farber submitted to this Court a written request to supplement the pretrial documents with a memorandum of law and an affidavit. During a telephone conference with the parties later that day, Mr. Farber indicated that the affidavit he intended to submit was that of Elizabeth Kummerfeld. Plaintiff's counsel objected to this submission, citing the material outstanding discovery that Ms. Kummerfeld had failed to provide that would be necessary for counsel's effective cross-examination of her. Upon the Court's subsequent request for an offer of proof, Mr. Farber indicated that the proposed affidavit would relate entirely to two issues; that is, two alleged repayments, each of $100,000, that were made on the original investment of $400,000 by Cordius Trust with KAI.

In his closing remarks, defense counsel again asked this Court for permission to let Ms. Kummerfeld testify. For the reasons I've already described at the beginning of today's proceeding and in the telephone conference with the Court last week, her testimony is barred not only as being untimely, but also the issues of the $200,000 are, at base, when all is said and done, absolutely irrelevant to the issues that I have to decide today.

At our telephone conference last week, I confirmed that these these two alleged payments were neither on the promissory note that is the subject of the present litigation, nor relevant to the defendants' affirmative defenses. Mr. Farber's request to submit the affidavit of Ms. Kummerfeld was, therefore, denied and still is. However, I did permit the defendants to submit a memorandum of law on their affirmative defenses of economic duress and usury, the only two issues identified by Mr. Farber last week as requiring briefing, and allowed the plaintiff to respond to any arguments on these two defenses. On February 7, Mr. Farber submitted a memorandum of law contending that the underlying transaction on which the promissory note was based was usurious and that the promissory note itself was unconscionable. Plaintiff's reply memorandum has also been received today.

At the trial Mr. Richards was cross-examined by

defendants' current counsel, Sheldon Farber. Based on this record, I now deliver my findings of fact and conclusions of law.

KAI is a corporation organized and existing under the laws of New York with its principal place of business in New York City. Kummerfeld is a resident of New York state and is president and director of KAI and exerts complete control over KAI. Cordius Trust is a trust organized and existing under the laws of California. Joel Richards, a resident of California, is the trustee of Cordius Trust.

In March 1997, Cordius Trust and KAI executed an agreement pursuant to which KAI promised to invest funds made available to it by the trust in a capital enhancement program consisting of three phases. The agreement stated that at the end of Phase I, which was to last 30 days, Cordius Trust would recover its investment capital together with its initial distribution of approximately 40 to 50 percent of its total cash investment. The agreement further stated that the profit distribution during Phases II and III of the program, each of which would last 15 weeks, is estimated to be 1 percent of the total cash investment per day to be distributed monthly.

Upon execution of the agreement, Cordius Trust provided KAI with $400,000 in accordance with the terms of the agreement. The agreement provided that the funds would remain in the account of Cordius Trust until and unless a bank

guarantee or similar instrument was exchanged for the funds. The agreement thus promised that the investment monies would be safeguarded.

In June of 1997, Kummerfeld reported that the investment of $400,000 with 200 percent profit would be released in a week or so. In approximately August of 1997, an entity unknown to Cordius Trust provided $100,000 to Cordius Trust. Kummerfeld characterized this money as, at least at one point in time, a return of $75,000 in principal and $25,000 in profits. In March of 1998, Kummerfeld reported that within two weeks the trust would receive $325,000 as a return of principal and 240 percent in profits in the amount of $780,000. The money was not forthcoming. In December 1998, David Abrams notified Cordius Trust that he had made separate arrangements with KAI for the repayment of $100,000 of the $400,000 that had originally been invested by the trust.

In early 1999, Richards attempted to settle the dispute that had arisen between the trust and KAI as a result of KAI's conduct regarding the funds the trust had provided pursuant to the agreement. As early as February 10 of 1999, Kummerfeld confirmed that a settlement as to all parties, including Abrams, had been agreed to and that that settlement included a principal payment of $325,000 and earnings in the amount of $1,093,000. When Kummerfeld was slow to finalize

the settlement, the plaintiff sent her a draft civil complaint reflecting allegations of fraud and other misconduct.

Kummerfeld ultimately executed a promissory note on March 5, 1999 in both her individual capacity and her capacity as president of KAI. The executed note was for $1,418,000. At the time Kummerfeld executed the Note, she was aware that she could have consulted an attorney regarding the terms of the Note, but, as reflected in the note's express terms, she voluntarily and knowingly waived that right.

Under the payment schedule established by the Note, the first payment to Cordius Trust was due no later than March 23, 1999. As to interest on overdue payments, the Note stated: "if each payment is not received on the date on which it is due, interest shall accrue on such overdue payment at the rate of 10 percent per annum from the date on which the payment was due . . . until the date on which the payment is received." The Note defined "events of default" as including "default in the payment of any installment of the interest on this Note when and as the same becomes due and payable and the continuance thereof for a period of ten days." Upon an event of default, Cordius Trust could, at its sole discretion, declare the entire principal sum of the Note then unpaid, together with interest, immediately due and payable. The Note stated that upon an event of default, interest would accrue on the unpaid principal amount of the Note at a yearly rate of 10

percent from the date on which the event of default occurred.

The defendants did not make the first payment due under the Note on March 23, nor any other payments. On April 2, 1999, Richard notified Kummerfeld that she and KAI were in default under the Note and that the entire debt was due and owing. Under the terms of the Note, interest runs at the rate of 10 percent on unpaid principal from the event of default, which is ten days after any installment is due but not paid, that is April 2, 1999.

The Note provides that it "shall be governed by and construed and enforced in accordance with the laws of the State of New York without regard to the choice of law principles thereof." "[A] promissory note stands on its own -- the note alone establishes the plaintiff's right to payment." Eisenstein v. Kelly Music & Entertainment Corp., 97 Civ. 4649 1998 WL 289734, at *4 (S.D.N.Y. June 4, 1998) (internal quotation omitted). Therefore, to state a cause of action on a promissory note, a plaintiff must simply show proof of the note and failure to make payment. See, e.g., Diversified Financial Systems, Inc. v. Bertrum, 97 Civ. 5718, 1999 WL 714081, at *2 (Sept. 14, 1999 S.D.N.Y.).

Cordius Trust has established that the 1999 Note was executed by the defendants and that no payments on the Note have been made. The defendants do not contest that they executed the Note or that they failed to repay the debt.

Instead they assert the following two affirmative defenses: that the defendants' signatures on the Note were obtained through economic duress, and that the Note is usurious.

Let me turn first to economic duress. A party seeking to void a contract because of economic duress "shoulders a heavy burden." Orix Credit Alliance, Inc. v. Bell Realty Inc., 93 Civ. 4949, 1995 WL 505891 at *4. Under New York law, a note is voidable on the ground of duress when it is established that the party asserting the claim of duress was forced to agree to the note by means of a wrongful threat precluding the exercise of his free will. Signet Corp. v. Interbank Fin. Servs., Inc., 755 F.Supp. 103 at 105. Thus, to establish duress, the defendants must prove the following elements:

(1) a threat, (2) which was unlawfully made, and (3) caused involuntary acceptance of contract terms, (4) because the circumstances permitted no other alternative. Kamerman v. Steinberg, 891 F.2d 424 at 431. A claim of duress is evaluated under an objective standard. See Eisenstein, 1998 WL 289734, at *4. Moreover, a contract entered into under duress is voidable, not void, id., and thus, in order to prevail on a coercion or duress defense to an action to enforce a contract, the defendant must have challenged the contract promptly. See, e.g., DiRose v. PK Management Corp., 691 F.2d 628 at 633-34 (2d Cir. 1982); International Halliwell

Mines Ltd. v. Continental Copper & Steel Industries, 544 F.2d 105 at 108 (2d Cir. 1976)

Defendants have failed to establish the elements of duress. Their argument that the plaintiff's announced intent to file a civil suit against KAI for the breach of the 1997 agreement amounts to an unlawful threat must fail as a matter of law. A threat to exercise one's legal rights does not constitute duress as a matter of law. Eisenstein 1998 WL 289734, at *5 n.2. Thus, the threat to commence litigation on a contract does not constitute duress, See, e.g., Orix Credit Alliance, Inc., 1995 WL 505891, at *4. Finally, the defendants have offered no evidence that the circumstances Kummerfeld found herself in were such as to permit no alternative but to sign the note.

Let me turn to the usury argument. In support of the argument that the Note is usurious, defendants rely upon the questionable terms and promised rates of return in the 1997 agreement between the parties and cite Hammond v. Mariano 451 N.Y.S.2d 484 (App. Div. 4th Dep't 1982), for the proposition that usury cannot be purged by covering the original transaction with another note which on its face is nonusurious. Apparently the argument is that the Note is invalid because it was undertaken to settle the dispute on a usurious contract. This argument is without merit.

As a preliminary matter, the cases on which the

defendants rely involve usurious rates of interest on loans. Although it is undoubtedly true that under New York law, a loan is usurious if the lender intends to take and receive a rate of interest in excess of that permitted by law, such statements are inapposite to defendants' argument that the 1997 agreement between the parties is invalid. The agreement was not a loan, but rather concerned projected rates of return on an investment. Further, to the extent that the agreement was otherwise tainted, such impropriety arose from the impossible rates of return promised by KAI, and thus cannot invalidate the Note plaintiff negotiated to settle the dispute on that agreement.

The defendants neither pled unconscionability in their answer, nor sought leave at any point to include this as an affirmative defense. Indeed, at no point did defendants announce their intention to make an unconscionability argument until they included it in the memorandum of law submitted the the day of trial.

Affirmative defenses are considered to have been waived unless they are pled in the defendant's answer. See, e.g., Travellers International, A.G. v. Transworld Airlines, Inc., 41 F.3d 1570 at 1580 (2d Cir. 1994); Doubleday & Co. v. Curtis, 763 F.2d 495 at 503 (2d Cir. 1985). Therefore, arguments as to the note's alleged unconscionability will not be considered.

Finally, the defendants' counterclaims must be dismissed as they are not supported by any evidence.

The only unconscionability that the Court can find in connection with this transaction is in connection with the underlying transaction and the defendants' actions. The defendants' promised investment program indicates to this Court an effort to defraud the plaintiff. The failure to pay and the false statements contained in the letters prepared by the defendant and submitted to the plaintiff and which have been received in evidence during the course of this trial show a course of conduct to further victimize the plaintiff and deprive it of monies to which it was lawfully entitled.

Having found on the record created by this trial that the defendants executed the Note; that the defendants have failed to fulfill any of their obligations under the Note; and that the defendants have been unable to establish any affirmative defense to its enforcement, I find in favor of the plaintiff. Judgment shall be entered in favor of Cordius Trust for the full amount of the Note, that is, $1,418,000, plus, as stated explicitly in the terms of the Note, prejudgment interest at a rate of 10 percent per year from the date of default.

As provided by the terms of the Note, the plaintiff is also entitled to reasonable costs and attorneys' fees incurred in bringing this action. Plaintiff has submitted

papers in support of its request for attorneys' fees. The defendant shall submit any opposition to that portion of the request for costs and attorneys fees by February 14. Any reply is due February 17.

Let me turn to the issue of sanctions.

Through its motion, plaintiff complained primarily of the defendants' failure to participate in the discovery process and sought entry of a default. That portion of its request, that is, for entry of the default, is mooted by the judgment I am entering in this case based on the trial we had today.

There was also a request for reimbursement for attorneys' fees in connection with the preparation of the motion and for travel expenses for one witness in connection with his deposition. Ultimately that witness's deposition was taken by telephone, and therefore I think that eliminates the need for me to reach the issue of whether reimbursement of travel expenses is necessary.

To the extent that the plaintiff seeks reimbursement of attorneys' fees for the bringing of the motion, that should be folded into the rest of its request for an award of attorneys' fees and costs in this case.

Do you want to add it or not to the request that's already been made?

MR. WADE: The legal fees are already in, your Honor.

In other words, if you granted the sanction it would be doubling up. So the legal fee is in our motion for legal fees.

THE COURT: Fine.

MR. WADE: I think the expenses by Mr. Richards in coming here on a fool's errand, in light of the order that the Court has entered, I think it would be hammering on for us to press that.

THE COURT: I've already denied that.

MR. WADE: Right.

THE COURT: OK. So we have a schedule. I think the only outstanding issue, then, is the attorneys' fees and costs. Opposition should be submitted by February 14, reply by February 17. With the reply why don't you also submit a proposed judgement, to which I will add whatever award I believe is appropriate in connection with attorneys' fees and costs.

MR. WADE: I presume we can update our affidavit on attorneys' fees up through the current time?

THE COURT: Yes.

You should do that promptly so it can be opposed.

MR. WADE: Yes. It is not hard. We submitted everything through January 31, and now we are up to the 7th day of February. That's not difficult. We can do that tomorrow.

THE COURT: OK.

MR. WADE: I have a request of the Court in light of the ruling and that is, we don't know where this is going to take us from here. Whether or not the defendants will appeal from your judgment, we don't know. We do know from the discovery that there are assets that we can look to, to try to recover on the judgment. We are going to ask the Court to retain jurisdiction of this case so that in the event we need the assistance of the Court to attempt to effectuate judgment, we can come back to this Court rather than having to start a new proceeding in front of a new judge and bring that judge up to speed on the matter. So we're asking that you retain jurisdiction. If they take an appeal, that's obviously another issue because then the Court of Appeals gets jurisdiction at that point. But if they don't, and we are attempting to recover judgment, we may need assistance of court. In addition to which, if as a result of our efforts to execute on the judgment further substantial legal fees are incurred, there may be an additur in that regard as well. We know from the history of this case there have been concerted efforts to make it difficult for us to proceed with the matter, and so we may need the assistance of Court in that regard as well.

THE COURT: You will have your request that I retain jurisdiction in the proposed judgment.

MR. WADE: Yes.

THE COURT: Mr. Farber?

MR. FARBER: Your Honor, I would like to address that matter. I have to object to him characterizing my client as recalcitrant in any way, because, as was obvious from the Court, many papers were not delivered. I believe some of it, a great deal of it was the fault of counsel who represented her previously. So I just want that characterization not carried forward in any fashion.

With regard to attorneys' fees and any motion or any opposition papers, of course I will discuss it with my client. Otherwise, I much appreciate the hearing, and we'll determine after we receive the transcript as to the course of action that we will take.

Thank you, your Honor.

THE COURT: Thank you, Mr. Farber. I appreciate your effort to assist me today.

In terms of whether or not your client has been recalcitrant personally or whether any failure to participate in discovery in an appropriate way was due to prior counsel, I don't think it's necessary or appropriate for me to make findings today. I would have to do that on notice.

Let me just say, Mr. Farber, now that you're in this case, I'm happy to judge that issue afresh going forward, and if there is no recalcitrance and appropriate cooperation with

the orders of this court, it will be greatly appreciated.

Thank you.

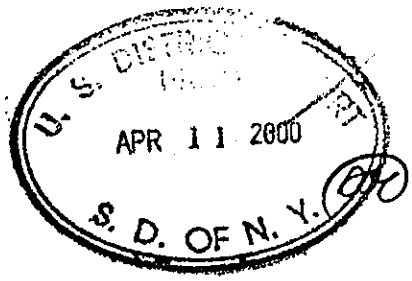
Thank you, all.

(Adjourned)

EXHIBIT 2

Case closed

4/12



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CORDIUS TRUST,

Plaintiff,

- against -

KUMMERFELD ASSOCIATES, INC. and ELIZABETH KUMMERFELD,

Defendants.

Case No. 99 Civ. 3200 (DLC)

JUDGMENT

00, 0848

#53

This action having come on for trial before the Court, The Honorable Denise L. Cote, United States District Judge presiding, the issues having been duly tried, and the Court having rendered its decision,

IT IS ORDERED AND ADJUDGED that Plaintiff recover from Defendants damages in the amount of $1,418,000.00, plus prejudgment interest at the rate of ten percent (10%) per annum, calculated from April 26, 1999 through the entry of this judgment, which totals to $111,011.87 through February 7, 2000 and continues to accrue at the rate of $388.49 per day until the date of this Judgment, plus postjudgment interest at the statutory rate of 6.287%, which shall be calculated on the damages plus the prejudgment interest earned up to the date of this Judgment from the date of this

Judgment until the date on which this judgment is satisfied, plus attorneys' fees and costs in the amount of $ 72,840.73 .

FURTHER, IT IS ORDERED AND ADJUDGED that the Defendants take nothing by their counterclaims and that the counterclaims be dismissed on the merits.

FINALLY, IT IS ORDERED AND ADJUDGED that this Court shall retain jurisdiction over this action to address any issues that arise and are brought before the Court in the course of the execution of this Judgment and to address any additional requests for attorneys' fees and costs associated with the collection of this Judgment.

Dated at New York, New York, this 10th day of April, 2000.
~~day of February, 2000.~~

James M. Parkison
Clerk of the United States District Court
for the Southern District of New York

Denise Cote
USDJ

CERTIFIED
JAMES M. PARKISON
F. Davidson

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 4/12/00

EXHIBIT 3

MANDATE

SDNY
99-CV-3200
Cote

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 30th day of December, two thousand.

PRESENT:

Hon. John M. Walker, Jr.,
Chief Judge,
Hon. James L. Oakes,
Hon. Pierre N. Leval,
Circuit Judges.

UNITED STATES COURT OF APPEALS
FILED
NOV 30 2000
SECOND CIRCUIT

CORDIUS TRUST,

Plaintiff-Appellee,

v.

No. 00-7444

KUMMERFELD ASSOCIATES, INC., and
ELIZABETH KUMMERFELD,

Defendants-Appellants.

APPEARING FOR APPELLANTS: SHELDON FARBER, Esq., New York, NY

APPEARING FOR APPELLEE: JAMES A. WADE, Esq., Hartford, CT

Appeal from the United States District Court for the Southern District of New York (Cote, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND

ISSUED AS MANDATE:
JAN - 2 2001

DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appellants Elizabeth Kummerfeld ("Kummerfeld") and Kummerfeld Associates, Inc. ("KA") appeal from the April 11, 2000 judgment of the district court, following a bench trial, awarding appellee Cordius Trust ("Cordius") $1,418,000 plus interest, attorneys fees, and legal costs. The award was based on the district court's finding that the appellants had defaulted on their payment obligations to Cordius pursuant to a promissory note ("Note") they had executed. On appeal, the appellants argue that the district court erred in excluding Kummerfeld's testimony regarding (a) usury in an earlier investment transaction that gave rise to the financial obligation the Note was intended to cover, and (b) economic duress in executing the Note due to Cordius's threatened litigation on the earlier business transaction. Appellants also contend that the district court erred in not considering their unconscionability defense.

For substantially the reasons set forth in the district court's opinion read into the record from the bench at the close of trial on February 7, 2000, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: Lucille Carr
Lucille Carr, Deputy Clerk

EXHIBIT 4

A-605

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CORDIUS TRUST,
Plaintiff,
-v-
ELIZABETH KUMMERFELD, KUMMERFELD ASSOCIATES, INC.,
Defendants.

99 CIV. 3200 (DLC)

OPINION AND ORDER

CORDIUS TRUST,
Petitioner,
-v-
DONALD KUMMERFELD,
Respondent.

Appearances:

For Petitioner:
James A. Wade
Bradford S. Babbitt
Ross Katz
Robinson & Cole, LLP
780 Third Avenue, 4th Floor
New York, New York 10017

For Respondent:
Paul Brown
Walter A. Saurack
Satterlee Stephens Burke & Burke LLP
230 Park Avenue
New York, New York 10169

DENISE COTE, District Judge:

This action arises out of the efforts of Cordius Trust ("Cordius") to collect a judgment entered by this Court against Elizabeth Kummerfeld ("Ms. Kummerfeld") and Kummerfeld Associates, Inc. ("KAI") on April 11, 2000, and affirmed by the

Second Circuit Court of Appeals on November 30, 2000. Donald Kummerfeld ("Mr. Kummerfeld") is Ms. Kummerfeld's husband. Together, they are the sole officers and shareholders of KAI.

On March 25, 2003, Cordius moved pursuant to Rule 69, Fed. R. Civ. P., for the issuance of a writ of execution and turnover order piercing the corporate veil of KAI in order to render Mr. Kummerfeld's assets amenable to attachment. Attached to Cordius's motion were evidentiary submissions in support of its claims, including the deposition testimony of Mr. and Ms. Kummerfeld. This action was referred to Magistrate Judge Ronald Ellis on March 27 for post-trial supervision. Mr. Kummerfeld opposed the March 25 motion on May 16 by filing his own evidentiary submissions, including his "Affidavit in Opposition to Petition and in Support of Motion to Dismiss" and excerpts of his deposition testimony and that of Ms. Kummerfeld, as well as a motion to dismiss the petition pursuant to Rules 12(b)(5) and 12(b)(6), Fed. R. Civ. P., on the grounds that service of process was inappropriate, the petition was defective, the action was improperly commenced as a special turnover proceeding, and Cordius failed to state a claim upon which relief may be granted. Over several months, the parties and Judge Ellis discussed Mr. Kummerfeld's procedural defenses and his June 13, 2003 letter request for sanctions. After determining that the record was complete, and that neither party wished to supplement its

submissions, Judge Ellis issued a Report and Recommendation ("Report") on February 19, 2004, recommending that Mr. Kummerfeld's motion to dismiss be denied and Cordius's motion to pierce the corporate veil be granted.

Mr. Kummerfeld has filed objections to the Report, Cordius has filed a response, and Mr. Kummerfeld has filed a brief in further support of his objections. For the following reasons, Judge Ellis's recommendations are adopted.

Background

The Original Action

The following facts are undisputed, unless otherwise noted. In the original proceedings before this Court, Cordius brought suit against Ms. Kummerfeld in her individual capacity and as president of KAI for breach of a promissory noted that she executed in settlement of claims of fraud and misconduct alleged by Cordius. On February 1, 2000, the Court denied defendants' motion to compel arbitration or, in the alternative, to dismiss the action for lack of jurisdiction. On February 7, at the conclusion of a bench trial, the Court delivered an Opinion granting judgment in favor of Cordius. As described in the February 7 Opinion, Cordius's claims arose from a March 1997 agreement in which KAI promised to invest Cordius's funds in a three-phase capital enhancement program.

Cordius provided KAI with $400,000 upon execution of the

agreement. In June, Ms. Kummerfeld informed Cordius that its investment, with a 200% profit, would be released in approximately one week. In August 1997, Cordius was provided $100,000. In March 1998, Ms. Kummerfeld reported that Cordius would receive a $325,000 return of principal and a 240% profit within two weeks. That amount was not forthcoming, and a dispute arose between the parties concerning KAI's handling of the funds made available by Cordius. On March 5, 1999, in settlement of the dispute, Ms. Kummerfeld executed in both her individual capacity and as president of KAI a promissory note for $1,418,000. None of the payments required by the promissory note were made.

The Court entered judgment in favor of Cordius for the full amount of the note, plus reasonable costs and attorney's fees. The Opinion stated:

> The defendants' promised investment program indicates to this Court an effort to defraud the plaintiff. The failure to pay and the false statements contained in the letters prepared by the defendant and submitted to the plaintiff and which have been received in evidence during the course of this trial show a course of conduct to further victimize the plaintiff and deprive it of monies to which it was lawfully entitled.

The Second Circuit affirmed the judgment in a summary order dated November 30, 2000.[1] Cordius Trust v. Kummerfeld Assoc., Inc. et al., 242 F.3d 264 (Table), 2000 WL 1775516 (2d Cir. Jan. 2,

[1] The mandate issued on January 2, 2001.

2001). On February 20, 2001, Cordius served Ms. Kummerfeld and KAI with a Restraining Notice to Judgment Debtor, pursuant to New York Civil Practice Law and Rules Section 5222(b). No payments have been made on the judgment owed Cordius.

KAI

KAI was formed in 1985 by Mr. and Ms. Kummerfeld, each of whom owns 50 percent of KAI's shares. Since the company's inception, Ms. Kummerfeld has been president and Mr. Kummerfeld has been chairman of the board and treasurer. In 1999, however, Mr. Kummerfeld could not recall who held the position of treasurer. He was also unaware of whether KAI had named a secretary or had adopted any by-laws. In 2001, Ms. Kummerfeld testified that KAI had never had a meeting of the shareholders, but that the board of directors met frequently, although no records were kept. Mr. Kummerfeld testified in 2000 that he had never attended a meeting of the shareholders or board of directors. In 2001, in another deposition taken by Cordius in its efforts to collect on its judgment, he stated that the shareholders and board of directors met, but that no records were kept of those meetings.

In 1997, KAI earned $35,045 in revenue, received $200,000 in loans from Mr. Kummerfeld, and incurred $661,746 in expenses. In 1998, KAI earned $35,000 in revenue, received $318,500 in loans from Mr. Kummerfeld, and incurred $731,935 in expenses. In 2000,

KAI earned $48,000 in revenue, received $412,500 in loans from Mr. Kummerfeld, and incurred $534,464 in expenses. Over the course of the years for which financial information has been made available,[2] KAI earned a total of only $118,045, received $931,000 in loans from Mr. Kummerfeld, and spent in excess of $1,920,000.

The expenses incurred by KAI included the following payments to Ms. Kummerfeld in 1997: $57,400 labeled "loan reimbursements," $3,741 to Ms. Kummerfeld for taxi services, $18,874.23 for meals, $9,025.30 for hotels, and $1,900 as petty cash. In 1998, Ms. Kummerfeld received $5,678.89 in petty cash, $3,411.40 for taxis, $6,747.83 for meals, and $42,789.00 for hotels. In 2000, Ms. Kummerfeld received $3,320 in petty cash, $12,901.82 for meals, and $40,611.05 for lodging.

In 1997, the Kummerfelds flew to Lisbon and Buenos Aires at KAI's expense. Mr. Kummerfeld states that only his wife was conducting KAI business at the time, but that he received his ticket free as part of a two-for-one ticket package. In 1999, KAI funds were used to pay lawyers representing Ms. Kummerfeld in connection with federal charges of wire fraud and mail fraud

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[2] Cordius stated in its motion for a writ of execution that KAI and Ms. Kummerfeld failed to produce financial information for 1999, 2000, and 2001, despite Cordius's repeated demands. Mr. Kummerfeld has not disputed this point, and has not produced the missing information even though it is in his control as chairman and treasurer of KAI.

relating to a high-yield investment scheme.[3] In 2001, Mr. Kummerfeld used KAI's office space to operate a personal business, but paid no share of the monthly rent of $20,000. In 2000, 2001, and 2002, the Kummerfelds purchased box seats at the U.S. Open to entertain KAI clients. The price of these seats in 2000 was over $20,000.

Based on KAI's business losses, the Kummerfelds declared tax deductions of $315,785 in 1997; $353,628 in 1998; and $417,189 in 2000. In 2001, Mr. Kummerfeld took out a $650,000 mortgage on his Cape Cod vacation home, appraised at approximately $1,700,000. He used the proceeds to loan approximately $400,000 to KAI. Cordius has been unable to attach the property in satisfaction of this Court's judgment because it is jointly held by Mr. and Ms. Kummerfeld.

Discussion

Rule 72, Fed. R. Civ. P., and the Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(A), provide the standard for district court review of a Magistrate Judge's order. For dispositive matters, a reviewing court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate

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[3] Ms. Kummerfeld was found guilty by a jury of one count of conspiracy to commit wire fraud and one count of wire fraud in connection with her participation in soliciting investors for a high-yield bank note fraud. The verdict was entered on August 17, 2001. No. 00 Cr. 49 (KMW) (S.D.N.Y.). She has not yet been sentenced.

judge." 28 U.S.C. § 636(b)(1)(C). The court shall make a de novo determination of those portions of the Report to which objection is made. United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997).

1. Rule 69 Proceeding

Mr. Kummerfeld contends that this action was improperly commenced as a turnover proceeding rather than a plenary action. The Report correctly concluded that this Court retains jurisdiction to enforce its judgment of April 11, 2000, pursuant to Rule 69, Fed. R. Civ. P. Rule 69 provides that "process to enforce a judgment shall be a writ of execution, unless the court directs otherwise." Rule 69, Fed. R. Civ. P. An action to pierce the corporate veil is "not itself an independent . . . cause of action, but rather is a means of imposing liability on an underlying cause of action." Peacock v. Thomas, 516 U.S. 349, 354 (1996) (citation omitted); Morris v. State Dep't of Taxation and Fin., 82 N.Y.2d 135, 141 (1993). An action to pierce the corporate veil in order to enforce a court's previous judgment is within the purview of Rule 69, Fed. R. Civ. P., and may be commenced as a petition for a writ of execution.

The Court's jurisdiction over this matter, however, is not ancillary. Peacock, 516 U.S. at 357 (action to pierce the corporate veil requires independent jurisdictional basis); Epperson v. Entertainment Express, Inc., 242 F.3d 100, 105 (2d

Cir. 2001) (same). Subject matter jurisdiction over this action is based on the diversity of citizenship of the parties, including Mr. Kummerfeld.[4] 28 U.S.C. § 1332.

Mr. Kummerfeld argues that this action falls outside the scope of New York Civil Practice Law and Rules Section 5225(b), cited in the Report as the applicable procedural rule.[5] This proceeding is based on the Court's authority to enforce its judgment under Rule 69, Fed. R. Civ. P., and New York's substantive law governing claims to pierce the corporate veil. Rule 69's provision that the "procedure on execution . . . shall be in accordance with the practice and procedure of the state in which the district court is held" does not require that a specific state rule of procedure apply to a given action. HBE Leasing Corp. et al. v. Frank, 48 F.3d 623, 633 n.7 (2d Cir. 1995) (the technical availability of Section 5225(b) is not dispositive when the district court has jurisdiction).

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[4] It is undisputed that Mr. Kummerfeld is a New York resident, and Cordius is a trust organized and existing under the laws of California.

[5] Section 5225(b) describes the procedure for the payment or delivery of property not in the possession of the judgment debtor as against "a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee." N.Y. C.P.L.R. § 5225(b).

2. Pleadings

Mr. Kummerfeld argues that Coridus's Rule 69 motion should be dismissed because he was not served with the pleading required under Section 402, N.Y. C.P.L.R.[6] The Report correctly finds that Mr. Kummerfeld received sufficient notice of Cordius's motion to pierce the corporate veil and render his assets amenable to attachment and an opportunity to be heard in response to the motion, vindicating his due process rights. See Nelson v. Adams, 529 U.S. 460, 466-68 (2000).

Section 2001 permits a court to disregard a procedural irregularity if "a substantial right of a party is not prejudiced." N.Y. C.P.L.R. § 2001. Mr. Kummerfeld was served with a Notice of Petition, a Memorandum in Law in Support of Petition, and an Appendix of Exhibits in Support of Petition. These documents provide detailed descriptions of Cordius's claims and the evidence and legal arguments on which Cordius relies. No substantial right of Mr. Kummerfeld was infringed by the absence of a separate document labeled "Petition."

3. Service of Process

Mr. Kummerfeld claims that the proceeding must be dismissed because Cordius did not succeed in personally serving him with the petition, as is required under Section 403, N.Y. C.P.L.R.

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[6] Section 402 states that "there shall be a petition, which shall comply with the requirements for a complaint in an action ...." N.Y. C.P.L.R. § 402.

The Report notes that Cordius attempted personal service upon Mr. Kummerfeld at KAI, but was informed that Mr. Kummerfeld had moved and left no forwarding address.[7] Cordius then sent a certified copy of the petition and accompanying papers to Mr. Kummerfeld at his home address and another copy to Mr. Kummerfeld's previous attorney in this action. The Report concludes that Cordius reasonably relied on this Court's prior Opinion in this action, No. 99 Civ. 3200 (DLC), 2000 WL 10268 (S.D.N.Y. Jan. 3, 2000), which authorized Cordius to serve Mr. Kummerfeld by mail, based in part on his purposeful attempts to evade service.

There is no dispute that Mr. Kummerfeld received the papers in this action, and that he filed a response with the Court. He argues, however, that the petition should be dismissed because the Court's prior authorization of service by mail does not extend to this petition initiating a new and independent action. As stated above, an action to pierce the corporate veil is a means of imposing liability on an underlying cause of action. Cordius made a good faith effort to serve Mr. Kummerfeld personally, and, when that failed, reasonably relied upon this Court's prior authorization in this litigation of alternative

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[7] Cordius also included with its petition an affidavit stating that it planned to send a process server to Mr. Kummerfeld's personal address. A previous Opinion in this litigation found that Mr. Kummerfeld's doorperson refused to permit access. No. 99 Civ. 3200 (DLC), 2000 WL 10268 (S.D.N.Y. Jan. 3, 2000).

service on Mr. Kummerfeld by certified mail.

4. Mr. Kummerfeld's Motion to Dismiss

A court may dismiss an action pursuant to Rule 12(b)(6) only if "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997) (citations omitted). In construing the complaint, the court must "accept all factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." Id. "Given the Federal Rules' simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514 (2002).[8]

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[8] Mr. Kummerfeld has raised several procedural objections related to his motion to dismiss. He contends that his motion to dismiss should be granted because Cordius has defaulted by not filing any opposition. While the failure to respond to a motion may in certain circumstances provides grounds for the granting of the motion by default, Mr. Kummerfeld is not entitled to such relief. See Local Rule 7.1 ("Willful failure to [file a memorandum of law] may be deemed sufficient cause for the . . . granting of a motion by default.") (emphasis supplied). Judgment by default is inappropriate in this matter given that Cordius has pursued this lawsuit over several years and at considerable expense. Although Cordius wrote Judge Ellis in June 2003 expressing its intent to withdraw the petition, Cordius subsequently informed Judge Ellis that it desired to pursue the requested relief.

Mr. Kummerfeld contends that he should have been permitted to present his claims at oral argument. There is, however, no

Mr. Kummerfeld filed a motion to dismiss this action pursuant to Rules 12(b)(5) and 12(b)(6), Fed. R. Civ. P., on procedural grounds already addressed and on the ground that Cordius failed to state a viable claim for relief. The Report recommended denial of the motion to dismiss.

Mr. Kummerfeld argues that the Report erred in recommending denial of his motion to dismiss when Cordius did not allege that Mr. Kummerfeld exercised dominion and control over KAI with respect to the transaction at issue -- KAI's failure to satisfy the judgment entered by this Court. Cordius's petition alleges the following. Judgment was entered in March 2000 and was affirmed by the Court of Appeals in November of that year. Mr. Kummerfeld has been chairman and treasurer of KAI since its founding and remains in those positions. He loaned KAI over

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right to oral argument on a motion to dismiss or a motion for summary judgment. Greene v. WCI Holdings Corp., 136 F.3d 313, 315-16 (2d Cir. 1998).

Mr. Kummerfeld also argues that because he moved to dismiss Cordius's claims, he had no opportunity to answer and to assert any affirmative defenses to this action. Mr. Kummerfeld's opposition to the Cordius motion included evidentiary submissions and substantive arguments in opposition to the motion, as well as a motion to dismiss based on asserted procedural defects. Judge Ellis, who supervised the litigation for approximately a year and held several conferences with the parties, concluded that neither party wished to supplement the record. He considered the matter fully submitted and issued a Report reaching the merits of Cordius's petition. Mr. Kummerfeld has provided no basis to question Judge Ellis's description of the proceedings before him or the judgment that the record was complete. Even now, Mr. Kummerfeld has not identified any affirmative defense that he wishes to assert that he did not present to Judge Ellis.

$400,000 -- roughly eight times KAI's income -- in 2000, and approximately the same amount in 2001. Mr. Kummerfeld was reimbursed for expenses incurred in his capacity as chairman in December 2000, and traveled internationally on KAI business in 2001. The petition sufficiently alleges that Mr. Kummerfeld exercised dominion and control over KAI when it failed to pay the judgment owed to Cordius.

Mr. Kummerfeld further contends that the Report erred in recommending denial of his motion to dismiss since Cordius did not allege that he committed any actionable fraud or wrongdoing against it. He argues Cordius does not point to evidence establishing that he was aware of his wife's fraudulent activities at the time that he made loans to KAI. The wrong Mr. Kummerfeld is alleged to have perpetuated is KAI's failure to satisfy the judgment entered by this Court. Cordius alleges judgment was entered by this Court in April 2000 and affirmed in November. The petition includes as exhibits the deposition testimony taken of Mr. Kummerfeld in December 1999, January 2000 and November 2001 in relation to this judgment. The petition alleges that Mr. Kummerfeld continued to act as chairman, treasurer and lender to KAI when it failed to pay the judgment owed to Cordius. Cordius has sufficiently alleged that Mr. Kummerfeld used his domination of KAI to perpetuate a wrong against the plaintiff.

5. Cordius's Motion to Pierce the Corporate Veil

In a special turnover proceeding based on New York law, made applicable pursuant to Rule 69, Fed. R. Civ. P., "a court may grant summary relief where there are no questions of fact, but it must conduct a trial on disputed issues of fact on adverse claims in a turnover matter." HBE Leasing, 48 F.3d at 633 (citation omitted).[9] Summary relief may not be granted unless the submissions of the parties taken together "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. The moving party bears the burden of demonstrating the absence of a material factual question, and in making this determination the court must view all facts in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When the moving party has asserted facts showing that the non-movant's claims cannot be sustained, the opposing party must "set forth specific facts showing that there is a genuine issue for trial," and cannot rest on the "mere allegations or denials" of the movant's pleadings. Rule 56(e), Fed. R. Civ. P.; accord Burt Rigid Box, Inc. v. Travelers

[9] In his objections, Mr. Kummerfeld argues that he is entitled to have a jury consider his defense to Cordius's petition, but does not dispute the applicable standard for summary relief.

Property Cas. Corp., 302 F.3d 83, 91 (2d Cir. 2002).[10]

Under New York law, a court may pierce the corporate veil "where 1) the owner exercised complete domination over the corporation with respect to the transaction at issue, and 2) such domination was used to commit a fraud or wrong that injured the party seeking to pierce the veil." MAG Portfolio Consult v. Merlin Biomed Group LLC, 268 F.3d 58, 63 (2d Cir. 2001); American Fuel Corp. v. Utah Energy Dev. Co., Inc., 122 F.3d 130, 134 (2d Cir. 1997). It bears emphasis that domination alone is insufficient to justify piercing the corporate veil. Freeman v. Complex Computing Co., 119 F.3d 1044, 1053 (2d Cir. 1997). The plaintiff must show that the dominator's control over the corporation was utilized to perpetuate a fraud or wrong injuring the plaintiff. Id. New York courts are reluctant to pierce the corporate veil, but are guided by principles of equity in determining whether to disregard the corporate form. William Wrigley Jr. Co. v. Waters, 890 F.2d 594, 600 (2d Cir. 1989); Brunswick Corp. v. Waxman, 599 F.2d 34, 36 (2d Cir. 1979).

To determine whether a company is dominated, courts consider many factors, including the following: (1) disregard of corporate

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[10] This Court's opinion in West Tsusho, Ltd. v. Prescott Bush & Co., Inc., No. 92 Civ. 3378 (DLC), 1994 WL 710798 (S.D.N.Y. Dec. 20, 1994), on which Mr. Kummerfeld relies, does not establish a different standard for the grant of summary judgment on a motion to pierce the corporate veil. In that case, unlike the present action, material issues of fact were raised that precluded summary judgment. Id. at *3.

formalities; (2) inadequate capitalization; (3) intermingling of funds; (4) overlap in ownership, officers, directors, and personnel; (5) common office space, address and telephone numbers of corporate entities; (6) the degree of discretion shown by the allegedly dominated corporation; (7) whether the dealings between the alleged dominator and the corporation are at arms length; (8) whether the corporation is treated as independent profit center; (9) whether others pay or guarantee debts of the dominated corporation; and (10) intermingling of property between the alleged dominator and the corporation. MAG Portfolio, 268 F.3d at 63. Whether to pierce the corporate veil requires a fact-specific inquiry in which no single factor is decisive. Freeman, 199 F.3d at 1053.

The Report concludes that Mr. Kummerfeld dominated KAI to the point that the corporation served as an alter ego for him and his wife, finding specifically that KAI disregarded corporate formalities, that KAI was inadequately capitalized, that the Kummerfelds appropriated KAI funds for their own use, and that the Kummerfelds mingled their personal funds with KAI funds. The Report finds that Mr. Kummerfeld's continued funding and management of KAI before and after this Court's judgment perpetuated KAI's wrong against Cordius. The Report therefore recommends that KAI's corporate veil be pierced to render Mr. Kummerfeld's assets subject to attachment.

Mr. Kummerfeld objects to the Report's recommendation that Cordius be awarded summary relief on the ground that there are material issues of fact with respect to whether he dominated KAI and whether his domination perpetuated a wrong that injured Cordius.[11] With respect to the domination element, Mr. Kummerfeld argues that he presented evidence raising a material issue of fact with respect to each of the factors on which the Report relied to support its conclusion that Mr. Kummerfeld dominated KAI with respect to its failure to satisfy this Court's judgment.

The Report concludes that KAI failed to observe corporate formalities. Mr. and Ms. Kummerfeld are the sole officers and shareholders of KAI; she is president, and he is chairman of the board and treasurer. In 1999, however, Kummerfeld could not recall if a secretary or treasurer had been named upon KAI's

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[11] Mr. Kummerfeld also raises an evidentiary objection to the Report's reliance on the deposition testimony of Ms. Kummerfeld. He argues that the testimony should be excluded pursuant to Rule 804(b)(1), Fed. R. Civ. P., because Ms. Kummerfeld is an available witness and Mr. Kummerfeld was not a party to the original action and did not have a motive and opportunity to cross-examine her at previous depositions. It is unnecessary to address the potential bases for the receipt of this evidence. Mr. Kummerfeld did not raise this evidentiary objection in papers submitted to Judge Ellis, and, in fact, relied on his wife's deposition testimony in both his motion to dismiss and his objections to the Report. Mr. Kummerfeld has waived this objection by failing to raise it before Judge Ellis and by relying on Ms. Kummerfeld's testimony. It is worth noting, moreover, that this evidence is not critical to the resolution of this action.

formation, or if there had ever been a shareholder meeting or meeting of the board of directors. In 2001, Mr. Kummerfeld stated that the board of directors had met during that year, but that no minutes or official records were kept of the meeting. Mr. Kummerfeld's argument that KAI is a functioning company does not raise a material issue of fact with respect to the Report's conclusion that KAI failed to observe corporate formalities.[12]

The Report concludes that KAI was inadequately capitalized. In 2000, KAI's expenses were approximately $534,464 and its revenue totaled only $48,000. Even Mr. Kummerfeld's loan of $412,500 was not sufficient to cover KAI's expenses. The financial data for KAI in 1997 and 1998 reveal even greater shortfalls, suggesting a pattern of undercapitalization that continued after judgment was entered against KAI by this Court.[13] KAI was undercapitalized even with Mr. Kummerfeld's infusion of personal funds. His argument that KAI was adequately funded because he loaned the corporation money is misplaced and does not

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[12] Mr. Kummerfeld's citation to In re Stylemaster Department Store, Inc., 154 N.Y.S.2d 58, 61 (N.Y. Sup. Ct. Westchester Co. 1956), is misplaced. The requirements under New York law for the election of directors and officers to a close corporation do not alter the Court's analysis of whether KAI disregarded corporate formalities.

[13] Mr. Kummerfeld stated in his 2001 deposition that he continued to fund KAI in "a similar fashion" during that year, although no financial data for KAI during that year has been provided.

create a question of fact.[14]

The Report concludes that the Kummerfelds appropriated KAI funds for their own use. For instance, KAI funds were used to pay lawyers who represented Ms. Kummerfeld in relation to a subpoena issued by federal prosecutors in Ohio and to federal charges of wire fraud and conspiracy to commit wire fraud, of which she was convicted in the Southern District of New York. Mr. Kummerfeld does not dispute this fact. Further, Mr. Kummerfeld operated his business out of the KAI offices, but did not pay any rent to KAI. Mr. Kummerfeld offers no documentation or other evidence to support his bald assertion that the rent-free arrangement was a form of repayment for his loans to the corporation. He has failed to raise a question of fact regarding the owners' appropriation of KAI funds for their own use.

The Report concludes that the Kummerfelds engaged in the commingling of their personal funds and those of KAI. Mr. Kummerfeld infused substantial sums of money into KAI during the years of 1997, 1998, and 2000. In 2001, he mortgaged his home on Cape Cod, deposited the funds in his personal account, and used

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[14] These figures were utilized by Cordius in its petition to pierce the corporate veil and were relied upon by Judge Ellis in his Report. Mr. Kummerfeld has waived his right to object to this evidence by failing to raise any objection before Judge Ellis or in his initial objections to the Report. His untimely claim in his recent reply that he has not yet had a chance to review the financial evidence provided by Cordius deserves no consideration.

the proceeds to pay KAI's debts and back rent. In 1997, Ms. Kummerfeld withdrew funds, characterized as "loan reimbursements," in excess of $50,000. Mr. Kummerfeld has provided no support for his argument that this disbursement was a repayment for a loan Ms. Kummerfeld had previously made to KAI rather than the comingling of personal and KAI funds.[15]

Mr. Kummerfeld has not raised a material issue of fact with respect to his domination of KAI. The record supports the conclusion that KAI disregarded corporate formalities and was inadequately capitalized, and that the Kummerfelds appropriated KAI funds for personal use and commingled their funds with those of KAI. In addition, the facts discussed above indicate that KAI was not treated as an independent profit center and that Mr. Kummerfeld paid KAI's debts.[16]

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[15] Mr. Kummerfeld relies on American Fuel, 122 F.3d at 135, for the proposition that by loaning money to KAI without transferring KAI funds into his personal account, he treated KAI as a separate entity. In American Fuel, there was no evidence that either of the two owners, each of whom was an active participant in the business, ever withdrew funds from the business for their own use. Id. Here, however, KAI funds were transferred to Ms. Kummerfeld for her personal use and were used to provide personal benefits to Mr. Kummerfeld.

[16] The records of KAI's finances made available by KAI for the years 1997, 1998, and 2000 describe a pattern of behavior by Mr. Kummerfeld supported by testimony concerning his interaction with KAI during 2001. Given this evidence, the burden was on Mr. Kummerfeld raise a material issue of fact. He failed to provide financial records related to the years 1999, 2002, and 2003, although those records are in his control and have been requested by Cordius.

In sum, Mr. Kummerfeld has raised no material issue of fact concerning his domination of KAI. He has not genuinely disputed Judge Ellis's findings that KAI disregarded corporate formalities, that KAI was inadequately capitalized, that the Kummerfelds appropriated KAI funds for their own use, and that the Kummerfelds intermingled their personal funds with those of KAI. Mr. Kummerfeld has not presented evidence related to these or to any other factor relevant to a piercing analysis to raise a disputed issue regarding a material fact or to provide a basis upon which a reasonable jury could find in his favor.

Similarly, Mr. Kummerfeld has not provided evidence genuinely disputing the Report's conclusion that his domination of KAI was used to perpetuate a wrong injuring Cordius, namely the failure of KAI to satisfy the judgment in this action. Mr. Kummerfeld was deposed three times in relation to the underlying action, and Mr. Kummerfeld does not contend that he was unaware of the judgment entered by this Court. He continued to loan substantial amounts to KAI, without which it likely would not have been able to continue, and continues to act as chairman of the board and treasurer. In 2001, he utilized KAI's office space and its seats to the U.S. Open, and traveled to Kuala Lampur for what he asserts was KAI business. Since the entry of judgment in March 2000, KAI has not made a single payment in satisfaction of the judgment owed to Cordius. Mr. Kummerfeld's contention that

he was unaware of the fraud committed by Ms. Kummerfeld and KAI prior to the entry of the judgment is not relevant to his participation in KAI's failure to satisfy the judgment entered by this Court.

Considering the facts specific to this action, it is necessary to pierce the corporate veil of KAI and render Mr. Kummerfeld's assets amendable to attachment in order to enforce this Court's prior judgment and to achieve equity in this matter. The Report's recommendations are adopted.

Conclusion

Mr. Kummerfeld's motion to dismiss is denied. Cordius's motion for a writ of execution and turnover order piercing the corporate veil of KAI and rendering Mr. Kummerfeld's assets amenable to attachment is granted.

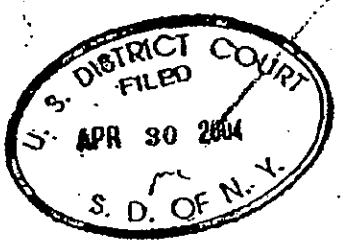
SO ORDERED:

Dated: March 30, 2004
New York, New York

DENISE COTE
United States District Judge

A-628

Doc #77



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CORDIUS TRUST,

Plaintiff,

- against -

KUMMERFELD ASSOCIATES, INC. and ELIZABETH KUMMERFELD,

Defendants.

CORDIUS TRUST,

Petitioner,

- against -

DONALD D. KUMMERFELD,

Respondent.

Case No. 99 Civ. 3200 (DLC)

JUDGMENT

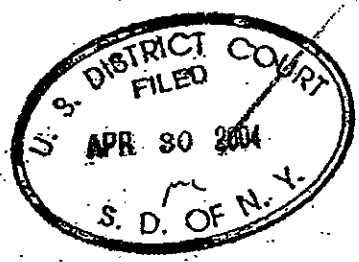
#04,0832

This action having come on for trial between the plaintiff, Cordius Trust, and the defendants, Kummerfeld Associates, Inc. and Elizabeth Kummerfeld, before the Court, The Honorable Denise L. Cote, United States District Judge presiding, the issues having been duly tried, and the Court having rendered its decision and entered judgment in favor of the plaintiff and against the defendants in the amount of $1,418,000.00 plus pre-judgment interest of $111,011.87 and post-judgment interest at the statutory rate of 6.87% per annum, plus attorneys fees of $72,840.73;

The defendants having failed to satisfy any portion of said judgment; and

EXHIBT 5

Doc #77



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CORDIUS TRUST,

Plaintiff,

- against -

KUMMERFELD ASSOCIATES, INC. and ELIZABETH KUMMERFELD,

Defendants.

CORDIUS TRUST,

Petitioner,

- against -

DONALD D. KUMMERFELD,

Respondent.

Case No. 99 Civ. 3200 (DLC)

JUDGMENT

A04,0832

This action having come on for trial between the plaintiff, Cordius Trust, and the defendants, Kummerfeld Associates, Inc. and Elizabeth Kummerfeld, before the Court, The Honorable Denise L. Cote, United States District Judge presiding, the issues having been duly tried, and the Court having rendered its decision and entered judgment in favor of the plaintiff and against the defendants in the amount of $1,418,000.00 plus pre-judgment interest of $111,011.87 and post-judgment interest at the statutory rate of 6.87% per annum, plus attorneys fees of $72,840.73;

The defendants having failed to satisfy any portion of said judgment; and

The plaintiff Cordius Trust thereafter moved pursuant to Federal Rule of Civil Procedure 69 for the issuance of a writ of execution and turnover order piercing the corporate veil of Kummerfeld Associates, Inc. in order to render respondent Donald Kummerfeld's assets amenable to attachment, and that motion having been referred to United States Magistrate Judge Ronald L. Ellis and Judge Ellis having duly considered the motion, Judge Ellis thereafter issued a Report and Recommendation to which the respondent Donald D. Kummerfeld objected; and

Upon the objection of the respondent Donald D. Kummerfeld, the Court, The Honorable Denise L. Cote, United States District Judge presiding, did consider the motion of Cordius Trust *de novo*, upon the submissions of the parties without oral argument, and the Court having rendered its decision granting the writ of execution and turnover order,

IT IS ORDERED AND ADJUDGED that plaintiff Cordius Trust recover from Donald Kummerfeld damages in the amount of $1,418,000.00 plus pre-judgment interest of $135,486.74 and post-judgment interest at the statutory rate of 6.87% per annum, which post-judgment interest totals $429,081.44 through April 10, 2004 and continues to accrue at the statutory rate, plus attorneys fees and costs in the amount of $72,840.73.

Dated at New York, New York, this 30th day of April, 2004

Denise Cote

The Honorable Denise L. Cote
United States District Judge

THIS DOCUMENT WAS ENTERED
ON THE DOCKET ON 5/3/04